UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GOOGLE, LLC and ALPHABET INC., a single employer

and

EDWARD GRYSTAR, an Individual

and

KYLE DHILLON, an Individual

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

KATHRYN SPIERS, Intervenor

and

SOPHIE WALDMAN, Intervenor

and

PAUL DUKE, Intervenor

and

REBECCA RIVERS, Intervenor

Cases 20-CA-252802
20-CA-252902
20-CA-252957
20-CA-253105
20-CA-253464

ORDER DENYING RESPONDENT'S PETITION TO REVOKE INTERVENOR'S SUBPOENA FOR TESTIMONY OF KENT WALKER

On August 17, 2021, the Respondent filed a petition to revoke Subpoena Ad Testificandum No. A-1-1D81Z7L for the testimony of Kent Walker (Walker), Google's Chief Legal Officer. Counsel for the alleged discriminatees filed a response on August 22, 2021. I permitted the Respondent to submit a reply, which was filed on August 23.

The Respondent claims that Walker does not a connection to the instant matter to warrant calling him as a witness, and that his thoughts, analyses, and mental impressions are attorney work product, and his internal communications about this case are privileged.

For the reasons discussed below, I decline to revoke the subpoena and deny the Petition.

Under Section 11(1) of the Act, the Board has broad authority to subpoena documents and witnesses during proceedings that result from charges or investigations. *American Postal Workers Union Local 64 (United States Postal Service*), 340 NLRB 912 (2003). Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

> [I]f in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose."

Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943).

In this regard, I note that the Board has interpreted the concept of relevance, for subpoena purposes, quite broadly. Thus, subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998) (the information needs to be only "reasonably relevant"). While the above principles and cases specifically apply to documents, which are much more frequently the subject of petitions to revoke subpoenas, the same principles apply to testimony sought from individuals.

As to the Respondent's first claim, that Walker does not have a connection to the instant matter sufficient to justify him being called as a witness, I first note that Walker, (as unnamed agent #2") is specifically referenced in complaint paragraphs 8, 9, 10, and 17; allegations which also concern the alleged discriminatees. Walker is the author of part of a community blog sent in November 2019 regarding matters directly related to this case. (Jt. Exh. 7). On November 12, 2019, Walker sent employees clarifications about the Need-to-Know policy and Community Guidelines, both of which are specifically implicated in the complaint. (Jt. Exh. 10.) He also sent the employees reminders of Googles data classification policies, and specifically so-called Need-to-Know data policies. (Jt. Exhs. 35, 36.) Alleged discriminatee Edward Grystar observed that Walker was consistently the point of contact for policies, and testified as such at the hearing. (Jt. Exh. 58.) It is reasonable to conclude that Walker may have relevant evidence to advance the intervenors'' case, and at the very least their counsel must be given the opportunity to question him about the complaint allegations naming him, and record evidence *he propounded* to a wide audience.[1]

With regard to attorney-client privilege, this privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of

[1] T

obtaining or providing legal advice to the client. See 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–72 (2000); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C.Cir.2007); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C.Cir.1998); *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C.Cir.1984); *Fisher v. United States*, 425 U.S. 391, 403("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *Smithfield Packing Co*., 344 NLRB 1, 13 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006).

The burden is on the party asserting the privilege to establish that it applies. See *EEOC v. BDO USA, LLP*, 876 F.3d 690, 695 (5th Cir. 2017); *U.S. v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009); *Construction Products Research, Inc*., 73 F.3d 464, 473 (2d Cir.), cert. denied 519 U.S. 927 (1996); *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991); and *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). "The attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents . . . The privilege must be specifically asserted with respect to particular documents." *U.S. v. El Paso Co*., 682 F.2d 530, 539 (5th Cir.1982).

As applied to in-house counsel, communications are privileged only upon a clear showing that the in-house attorney participated in a professional legal capacity. See *In re Sealed Case*, above, at 99 (company could shelter former vice president/general counsel's advice "only upon a clear showing that he gave it in a professional legal capacity"). See also *U.S. v. Chevron Texaco Corp*., above, 241 F.Supp.2d 1065, 1076 (N.D. Calif. 2002); and *Boca Investerings Partnership* v. U.S., 31 F.Supp.2d 9, 11–12 (D.D.C. 1998). *In re Google, Inc*., 462 Fed. Appx. 975, 978 (Fed. Cir. 2012) (same "clear showing" must be made even if the in-house attorney did not have distinct nonlegal responsibilities). As such, counsel for the intervenors may question Walker on non-privileged communications.

The work product privilege, first recognized by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and later codified in Federal Rule of Civil Procedure 26(b)(3), protects from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial. See *Central Telephone Company of Texas*, 343 NLRB 987, 988 (2004). As the documents counsel for the intervenor seeks to question Walker about were widely disseminated to employees, they squarely do not fall into this category, and even if they did, work product privilege has been waived.

The Respondent urges application of *Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986). After an exhaustive search, I could find no Board case adopting the *Shelton* criteria (which passed only on attorney work product privilege, and declined to address the issue of attorney-client privilege), or even citing to the case for any purpose. The unpublished district court cases the Respondent cites to in its petition to revoke specifically address deposing opposing trial counsel. Such is not the present situation.

Notwithstanding the foregoing, I will not permit unfocused, free-flowing, "fishing expedition" type of examinations of this (or any) witnesses. If counsel seeks to elicit evidence that does not reasonably advance her case, does not properly address anticipated defenses, raises tangential issues that would unduly prolong the trial, or poses questions that would call for privileged answers, I will welcome and rule on objections with strong consideration of the objectives of preservation of privilege and judicial efficiency.

Accordingly, and for the reasons set forth above, I DENY Respondent's petition to revoke the subpoena ad testificandum related to Mr. Walker’s trial testimony.

SO ORDERED

Dated: August 25, 2021

Eleanor Laws
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party, vs. GOOGLE LLC and ALPHABET INC., a single employer, Respondents.	**CASE NO. 20-CA-252957, 20-CA-253105, 20-CA-253464** **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S REPLY IN SUPPORT OF THEIR PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L; SUPPLEMENTAL DECLARATION OF KENT WALKER**

The opposition brief filed by the alleged discriminatees' counsel suffers from five important defects:

- ***First***, to the extent the alleged discriminatees rely on the Community Blog Post that was posted under Mr. Walker's name (Exhibit D to the alleged discriminatees' response), it does not support their claim that Mr. Walker "was an active participant" in the at-issue disciplinary actions. As an initial matter, Mr. Walker did not author the statement. *See* Supplemental Declaration of Kent Walker, attached as Exhibit A. The blog post was authored by others, and was posted under Mr. Walker's name. *Id.* Moreover, the only portion of the blog post that even refers to any of the alleged discriminatees in this case is the two sentences that appear as paragraph 2:

> 2. A second person has been put on leave while the investigations team looks into why they deliberately searched for, accessed, and shared a number of confidential or need-to-know documents outside the scope of their job, after receiving prior feedback not to do so. Many of these documents subsequently appeared in the press.

  Those two sentences (again, authored by others) hardly reflect actual involvement by Mr. Walker in that individual's discipline, or the underlying investigation. Mr. Walker did

not then, and does not now, have first-hand personal knowledge of the facts stated in those sentences. The point remains: Mr. Walker was not involved in the investigations of, or the disciplinary decisions related to, the alleged discriminatees. *See* Walker Declaration submitted with Google's Petition to Revoke.

- ***Second,*** one of Google's points is that counsel for the alleged discriminatees has not identified any fact that supposedly needs to be established through Mr. Walker's testimony.[1] That is still the case, even after a thirteen-page opposition brief. Instead, the alleged discriminatees rely on nothing more than a conclusory statement that Mr. Walker "is the single thread that runs through the entire consolidated complaint." Simply put, nothing supports that statement. Just saying it does not make it true.
- ***Third***, it is notable that the alleged discriminatees still have not made any attempt to pursue a factual stipulation regarding any supposed fact that they seek to establish through Mr. Walker's testimony. As described in *Shelton*, that failure further reflects that the alleged discriminatees are, in fact, seeking an opportunity to delve into his mental impressions and privileged communications. *See Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1330, fn. 7 (8th Cir. 1986) (finding that several factors supported that plaintiffs' counsel was attempting to discover opposing counsel's mental impressions on the case, including their rejection of the company's offer to establish facts through other methods that would not run the risk of invading privilege). That is improper.
- ***Fourth***, the alleged discriminatees' opposition is strikingly devoid of Board law – and for good reason. No Board law of which Google is aware supports forcing an in-house counsel to testify on a record like this. The alleged discriminatees argue that the attorney-client privilege should not automatically apply to in-house counsel, but Google

[1] Counsel for the General Counsel determined long ago that Mr. Walker is not a needed witness, opting instead to stipulate to the limited number of points and documents that involve his name, such as his receipt of the prank emails described in Google's Petition to revoke, and his May 9, 2019 email describing Google's policies.

is not arguing it does. Mr. Walker's declaration, submitted with Google's Petition to Revoke, establishes his limited role vis-à-vis this case as an attorney.

- ***Finally***, the alleged discriminatees' argument that the so-called "Shelton test" does not apply is incorrect. See authorities provided in Google's Petition to Revoke, p. 4. Importantly, the alleged discriminatees' opposition concedes that neither the second nor third factor of the Shelton test is satisfied here. All are required. *Shelton*, 805 F.2d at 1327.

DATED: August 23, 2021

Respectfully submitted,
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EXHIBIT A

DECLARATION OF KENT WALKER

I, Kent Walker, do hereby declare and state as follows:

1. I have personal, first-hand knowledge of the facts set forth in this declaration and, if called upon to do so, I could and would testify competently to them.

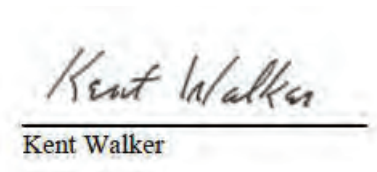
2. I make this Declaration in support of Respondents Google LLC and Alphabet Inc.'s Reply in Support of Petition to Revoke Subpoena *Ad Testificandum* No. A-1-1D81Z7L.

3. I am the Chief Legal Officer and Senior Vice President of Global Affairs for Google. I have held those titles since 2018, before which I served as General Counsel.

4. In November 2019, I authorized and approved a community blog post that used my name concerning Google's Need to Know policy and its Community Guidelines. A copy is attached as Exhibit D to Intervener's Response to Google's Petition. The content of that post was authored by others, reviewed and approved by me, and posted under my name. With regard to the statements made in paragraph 2 of that post, which is the portion discussing an alleged discriminatee, I did not then, and do not now, have any first-hand personal knowledge of those facts.

5. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 23rd day of August 2021 at Palo Alto, California.



Kent Walker

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2021, I electronically filed the foregoing **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S REPLY IN SUPPORT OF THEIR PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L** with the National Labor Relations Board using the agency's website (www.nlrb.gov). I also certify that I have served said **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S REPLY IN SUPPORT OF THEIR PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L** upon the following parties, via e-mail, pursuant to NLRB Regulation 11846.4(b):

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BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, et al	)	CASE NOS. 20-CA-252957, 20-CA-253105, 20-CA-253464
Charging Party,	)	INTERVENERS' RESPONSE TO GOOGLE'S PETITION TO REVOKE SUBPOENA *AD TESTIFICANDUM* NO. A-1-1D81Z7L (Kent Walker)
vs.	)	
GOOGLE LLC and ALPHABET INC., a single employer,	)	Hon. Judge Eleanor Laws
Respondents.	)	

I. INTRODUCTION

It would appear, after reading Google's Petition to Revoke the Subpoena *ad Testificandum* issued to Kent Walker, that Google is litigating an entirely different case from the one that the General Counsel and the Interveners are litigating. Google's statement of "facts" is wildly inaccurate as are its legal conclusions. Kent Walker – Google's chief legal counsel – is the one person in this matter who was an active participant in triggering all of the underlying actions that led to the termination of each Discriminatee in this matter. Walker is the single thread that runs through the entire consolidated complaint.

Nor is Walker a mere passive observer in this matter – the "butt of a joke" or prank – as Google suggests. Instead, the Record evidence that is available to Interveners thus far[1] demonstrates that Walker used his power and prestige as Chief Legal Counsel as

[1] As of Sunday, August 22, 2021, noon (Pacific) Interveners have not received any response to their July 28, 2021 subpoena. Google did provide Interveners with a massive "document dump" on Friday, August 20, 2021, which appears to be similar to the "production" that it issued to Region 20 in response to its own trial subpoena. However, this "production" is a massive

a sword to malign the Discriminatees and he now seeks to yield that same power as a shield against being compelled to testify regarding his actions. But the shield offers no more protection than the Emperor's new clothes because Walker's communications maligning the Discriminatees was made publicly to all Google employees via its "Community Guidelines" blog and was broadly shared with the entire public at large. By speaking publicly about his rationale for investigating and ultimately terminating the employment of the Discriminatees. Walker voluntarily waived any and all privileges he or Google may have held regarding these matters. As is demonstrated below, the Interveners are unquestionably entitled to examine Walker's role in the unlawful termination of their employment and in maligning their character and reputation in the community at large.

PROCEDURAL HISTORY

On Friday, August 6, 2021, counsel for the Interveners (Burgess) sent counsel for Google (Kalis) an email reminding Kalis of Burgess' intent to subpoena several Google employees – including Kent Walker – to testify at the Hearing in this matter and of Kalis' voluntary offer to accept the subpoenas on the employees' behalf. A true and accurate copy of that email communication is attached hereto as **Exhibit A**. In that email Burgess acknowledged that the counsel for General Counsel ("GC") may have separately subpoenaed some or all of these individuals (the GC has never shared its subpoena *ad testificandum* with Burgess) but that Burgess wished to preserve the right to call these individuals in her case in chief. *Id.* Burgess also offered to cooperate with Kalis regarding the timing for calling these witnesses and also stated that she might be able to

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document dump that makes no attempt to properly segregate documents in any comprehensible manner.

limit the list of witnesses depending upon what Burgess learned from receiving discovery responses from Google which Burgess expected to be provided imminently. *Id.*

In that email communication, Kalis represented that the GC had agreed to refrain from calling Google witnesses during its case-in-chief and instead would wait for Google to call these witnesses first. *Id.* Burgess confirmed that she was not party to that agreement and planned to call Google witnesses in her case in chief. *Id.* No other discussion – orally or in writing – occurred between Burgess and Kalis regarding this matter until Kalis filed her Petition to Revoke on August 17, 2021. Kalis never asked Burgess why she was calling Walker as a witness and never asked to discuss the timing or scope of the testimony that Burgess intended to elicit from Walker. Nor has Kalis or the GC shared any alleged "stipulation" regarding Walker's testimony described in (PTR at 2) with Burgess including through and including today's date (August 21, 2021) and Burgess remains unaware that any such stipulation referred to in Google's PTR exists.

STATEMENT OF FACTS

Google's statement of facts implies that Kent Walker's sole involvement in this matter was in connection to what Google now characterizes as a "prank" that led to "no discipline" of Kyle Dhillon (the originator of the "prank") or others who participated in creating the "prank," and that the "prank" itself "did not violate Google policy." In fact, however, Google coercively and unlawfully interrogated Dhillon and other discriminatees regarding this "prank" and expressly include a recap of Dhillon's involvement in this "prank" in the "FINAL WARNING" it issued to Dhillon on January 6, 2020. (See **Exhibit B**). If Google is now conceding that its coercive interrogation of Dhillon over this "prank" and its inclusion of this incident in the FINAL WARNING it issued him was

improper, Interveners will gladly consider a stipulation from Google admitting as much.

But Walker's involvement in the consolidated complaints goes well beyond serving as the recipient of the "prank" emails that Dhillon enabled fellow employees to send him. Indeed, Walker's involvement is self-evident from the face of the Complaint. He is specifically identified as the Google agent ("Unnamed agent #2") involved in the Complaint allegations¶¶ 8, 9, 10, and 17.

One of the core allegations in the amended Complaint concerns Google's conduct of issuing new "data classification" policies regarding what Googlers – who were historically encouraged to peruse its massive data-base "MOMA" to look at absolutely any material contained therein that was not clearly marked in bold red letters "CONFIDENTIAL" – to a new system with undefined amorphous parameters. Kent Walker issued the announcement regarding this change in policy on May 9, 2019.

Googlers objected to these new standards and sought clarification regarding the intent and application of this new "policy" fearing – correctly – that in the absence of such clarification, the policy would be used to discriminatorily discipline or terminate the employment of Googlers who e.g. were engaged in union organizing campaigns and other concerted protected activity. Complaint ¶12, (**Exhibit C**).[2] They were correct. Terminated discriminatees Rivers, Waldman, Duke and Berland[3] were surveilled, coercively interrogated and terminated for looking at documents in MOMA that pertained to workplace conditions that they were concerned about. Complaint ¶9. Specifically,

[2] **Exhibit C** consists of "memes" which are images (photos, cartoons, drawings) with (frequently clever or ironic) statements on them. Googlers were able to post their thoughts about Google policies via "memegen." **Exhibit C** contains a sampling of memes that Googlers submitted regarding their concerns over Walker's new community guidelines and the implementation of those guidelines to discriminatorily target employees engaged in concerted protected activity.

[3] Berland is no long a charging party in this matter.

they became aware that Google was surreptitiously planning to contract with the government to provide services that would enforce then President Trump's border control policies. Complaint ¶15(a)(f). Googlers believed that this action was contrary to Google's motto and contractual mandate "Don't be evil" and to call out Google if they believed Google was engaged in "evil." See Complaint ¶15 (b)-(h). The Googlers were also well aware that the implementation of these policies would impact the hundreds if not thousands of their fellow immigrant co-employees and the families of such employees. *Id.* In each instance, the documents that the terminated discriminatees reviewed were not marked either as "confidential" or "Need to Know" ("NTK") materials. *Id.* Instead, they all reviewed materials that were readily available and accessible to any Google employee who wished to find them in MOMA. *Id.* Two employees – Berland and Rivers – were placed on administrative leave in response to their conduct of looking at materials that were not marked "NTK" – triggering others, including Duke and Waldman – to actively coordinate protests against this action.

In response to the mounting concerns among Googlers – both regarding Google's involvement in enforcing Trump's border control policies and regarding the change in Google's "classification" policy – on November 12, 2019, Kent Walker issued a company-wide statement asserting – falsely – that Rivers "deliberately searched for and share a number of confidential or need to know documents . . . after receiving prior feedback not to do so." (**Exhibit D**). He also stated that these documents "subsequently appeared in the press" – insinuating that Rivers was responsible for leaking documents

that should only be shared internally.[4] *Id.* Finally, Walker stated that the conduct that Rivers engaged in has "never been tolerated" at Google – again, falsely implying that Rivers had engaged in gross misconduct. *Id.* Walker also spoke in detail about his view of the terminations during a company-wide Q&A session. (**Exhibit E**).

Googlers held a rally in support of Rivers and Berland (who was also maligned in Walker's 11/12/19 public statement) and on the next business day after the rally, the Monday of Thanksgiving week, Duke and Waldman, along with Rivers and Berland were terminated.

Discriminatee Grystar organized the aforementioned rally and drafted numerous statements raising concerns about these actions and questioning Google's new "policy" in which Googlers were expected to somehow know that they could be terminated for looking at documents not marked "confidential" or "NTK." *See, e.g. go/concerns-about-data-classifications-policies* and *go/concerns-about-data-classifications-policies-form* and Consolidated Complaint allegations ¶17(a), (b), and in response he and others were coercively interrogated about these actions. Complaint ¶8. Given the uncertainty and fear among Googlers regarding what (unmarked) documents they could now be terminated for looking at, Discriminatee Dhillon wrote a document suggesting that Googlers "always ask Kent [Walker]" prior to viewing any document that they were uncertain about viewing. Dhillon and Spiers ultimately turned the "always ask Kent" concept into a program ("chrome extension") that would enable Googlers to actually send Kent Walker an email asking whether a specific document not marked as "NTK" would be *post facto*

[4] In fact, Rivers had brought to Google's attention that one meme that arose out of discussion regarding border control issues, appeared to violate Google's policies regarding appropriate memes. Google refused to take down the meme that Rivers flagged as inappropriate and refused to tell her why. Rivers then sought documents that would explain Google's meme take-down process. She was terminated for conducting that search. Complaint ¶16.

characterized by Google as "NTK" material and hence be terminated for viewing. Complaint ¶9, 10, 17 (b)(c). It is this "always ask Kent" chrome extension that Google represents in its PTR that is the "only" matter in which Kent Walker was involved.

In furtherance of concerns regarding Google's use of Walker's new Community Guidelines that Discriminatee Spiers wrote a chrome extension that created a tiny "pop up" on Googlers' computer screen reminding them – if they conducted research into the role of IRI, the union-busting firm that Google had just hired – that they had rights under Section 7 of the NLRA to engage in concerted protected activity. Spiers was terminated for this activity, Dhillon, who provided only a mechanical technical review of the chrome extension was given a "FINAL WARNING" for his role in this activity and Grystar, who only reviewed the computer language of the chrome extension was likewise disciplined for his scant "involvement" in this activity.

Thus, contrary to Google's representation, virtually all of the unlawful activity alleged in the Complaint arise from the same *res gestae* and Kent Walker is a primary, if not *the* primary Google agent at the center of these allegations. It is in this context that we request the ALJ to review Google's pending PTR.

LEGAL ARGUMENT

Google's legal argument for revoking the Walker subpoena is based upon two cornerstones: (1) that as Google's in-house counsel, Walker deserves the fundamental protection afforded to attorney-client privilege; and (2) any assessment regarding the Intervener's right to call Walker as a witness is governed by *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Each of these legal premises is misplaced. Its arguments – built on a house of cards – fails to demonstrate any basis for revoking the

Intervener's legitimate and fully enforceable subpoena.

A. In-House Counsel Is Not Entitled to a Rebuttable Presumption of Attorney-Client Privilege

Google represents in the introduction to its legal argument that "[t]he attorney-client privilege applies to 'in-house' counsel just as it would to any other attorney. *NLRB v. Sears, Roebuck & Co.*, 421U.S. 132, 154 (1974). This is not accurate; where a corporation takes the step of retaining outside counsel, the nature of the relationship creates a rebuttable presumption that the law firm's services were secured for the purpose of obtaining legal advice and in the absence of waiver would generally be privileged and protected.[5] Because in-house counsel plays many roles, the same presumption does not apply. As (then) Circuit Judge Ginsburg explained, communications between the corporation and its in-house counsel are privileged "only upon a clear showing that [the advice] was given in a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). Applying the "presumption" of privilege to an in-house attorney as Google asks the Judge to do here, constitutes reversible error. *United States v. Chevron Corp.*, No. C–94–1885 SBA, 1996 U.S. Dist. LEXIS 4154, at *9-10 (N.D. Cal. Mar. 13, 1996).

Given the ambiguous role of in-house "counsel," Courts and legal scholars alike have taken a critical view of corporations relying upon privilege to suppress relevant information pertaining to a corporation's alleged unlawful conduct. *See B.F.G. of Ill., Inc. v. Ameritech Corp.*, No. 99-C-4604, 2001 U.S. Dist. LEXIS 18930, at *6 (N.D. Ill. Nov. 13, 2001) (criticizing the defendants' "use of in-house counsel to give a veneer of

[5] Even in such circumstances, where, as here, the privilege is waived, outside counsel can be compelled to testify regarding otherwise privileged communications. *See, e.g. Community Learning Center Schools, Inc.* (2017) PERB Order No. Ad-448 at pp. 14-15)(interpreting California State law and the Employment Education Relations Act).

privilege to otherwise non-privileged business communications"); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 446 (1982) (the privilege's "staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed . . . . [and] potentially hinders the administration of justice.").

Google has failed to sustain its burden of providing a "clear showing" that when Walker, as in-house counsel, made these comments or participated in effectuating actions that led to the Discriminatees' termination is entitled to attorney-client privilege at all. Its failure to sustain this burden is inexcusable since Google has ventured down this path before and has had its in-house counsel "privilege" arguments flatly rejected. *See In Re Google, Inc.* 462 Fed.Appx. 975, 978 (Fed. Cir. 2012)(a "clear showing" that in-house counsel was acting in legal capacity is required even where in-house counsel plays no distinct nonlegal roles for the Corporation).

B. The "Flexible Assessment" Approach Which Supersedes *Shelton* in Assessing the Right to Subpoena Counsel Firmly Supports Interveners' Right to Subpoena Walker's Testimony.

As noted in the Introduction Section *infra.* at 7, Google insists that under *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) Walker cannot be compelled to testify unless Interveners demonstrate that (1) no other means exist to obtain the information than to [subpoena] opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Google then offers the *non sequitur* that since it has produced no documents indicating that Walker had a role in deciding or effectuating the Discriminatees' termination, Walker knows nothing and therefore Interveners have no basis for subpoenaing his

testimony. (PTR at 2). True enough – to date, Google has provided no written documentation that explains the rationale for Walker's false and/or grossly misleading assertion that the Disciminatees violated company policy. But that does not mean that Walker "knows nothing." On the contrary, Walker asserted both orally and in writing that the Discriminatees in this matter violated company policy. *See e.g.* Kent Walker's November 12, 2019 blog on the Google-wide Community Guidelines platform (**Exhibit D**) and portions of his statements in response to a Google-wide Q&A session (**Exhibit E**).

Thus, taking Google's counsel at their word – i.e. that "no documents exist" that record, mention or describe the basis for Walker's false/misleading statements (PTR at 2), Google has effectively conceded that at least one of the three *Shelton* criteria for requiring counsel to testify has been met, namely that no other means (such as document production) exists to discover the basis for Walker's false and misleading statements. The only avenue available to Interveners for finally learning the basis for Walker's false statements is to call him to testify about this subject.

Separately, as Google's counsel should know, the "*Shelton*" analysis that Google asks the Judge to rely upon has never been accepted as the majority approach for determining when counsel may be called to testify in a matter. As (then Circuit Judge) Sotomayor noted in *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003), only the Sixth Circuit followed the Eighth Circuit's *Shelton* analysis. In rejecting the *Shelton* rule and instead applying a "flexible approach" to this determination (then) Circuit Judge Sotomayor explained:

> The deposition-discovery regime set out by the Federal Rules of Civil Procedure is an extremely permissive one to which courts have long "accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts [need not] be carried on in the dark." *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (quoting *Hickman v.Taylor*, 329 U.S. 495, 501, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (internal quotation marks omitted)). Indeed, the rules provide for the taking of discovery, including by oral depositions, "regarding *any* matter, not privileged, that is relevant to the claim or defense of *any* party" and that "[r]elevant information need not be admissible." *See* Fed.R.Civ.P. 26(b)(1) (emphasis added). Moreover, the rules generally do not place any initial burden on parties to justify their deposition and discovery requests. *See, e.g.*, Fed.R.Civ.P. 30(a)(1) ("A party may take the testimony of *any person* . . . by deposition upon oral examination without leave of court.") (emphasis added); Fed.R.Civ.P. 26(c) (permitting courts to issue a protective order upon "good cause shown" by the party *opposing* discovery).

In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 71 (2d Cir. 2003). In *Shelton*, the defendant relented and agreed to voluntarily produce counsel for examination while the case was pending. But the "flexible" and more permissive approach to assessing whether counsel may be called to testify in a matter – one that "takes into consideration all of the relevant facts and circumstances" including "the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted" – is the clear majority approach, not *Shelton*.

Here, numerous facts and legal argument mitigate in favor of requiring Walker to appear to testify at the hearing. First, and most obviously, Walker has waived any privilege that might have attached to his alleged attorney/client communications regarding the termination of the Discriminatees by prominently, publicly and broadly discussing his assertion that the Discriminatees violated company policy (**Exs. D, E**). Irrespective of what "hats" he wears/wore as Google legal counsel, by sharing his opinion

and beliefs on this issue. Walker knowingly waived any privileged discussions concerning these matters.

In the Declaration that Google attached to its PTR Walker swears under oath that "all knowledge that I have regarding [the discriminatees] and regarding the case comes from privileged communications and my own analysis as part of my role as the company's legal counsel." Again – taking him at his word – because Walker provided detailed written and oral statements to all Google employees regarding Google's purported legitimate rationale for terminating the Discriminatees, all of the purported "privileged communications" and his analysis has been lost whatever privilege it would have had as a result of these detailed voluntary disclosures.

The Discriminatees dispute that they violated any company policies and indeed, in some instances they were told during Google's investigative interview of them that they had not violated any policies. Yet Walker told all Google employees orally and in writing that these individuals violated company policies – simultaneously irrevocably tarnishing the reputations of the terminated employees chilling other employees from engaging in concerted protected activity for fear of receiving similar unjustified reprobation. Walker's statements hence trigger examination under the "crime fraud" exception to the attorney-client privilege. The crime-fraud exception was established more than 100 years ago in *Alexander v. United States*, 201 U.S. 117 (1906) and has been interpreted to cover communications between an attorney and client that further a crime, tort or fraud. *See also Wigmore on Evidence* at § 2298. The NLRB has held that the crime/fraud exception may be raised in cases under the NLRA but has not held that the exception applies to violations of the NLRA. *Patrick Cudahy Inc.* 288 NLRB 968, 973.

However, here, separate from an 8(a)(1) violation Walker's actions potentially give rise to the tort of "false light" (public statement that is highly offensive and implied to be true but is actually false) and/or defamation (false statement of fact that injures one's reputation) – matters that *are* captured under the crime/fraud exception.

Finally, as the ALJ is well aware, Interveners are not privy to discovery mechanisms that exist under State and Federal Rules; instead, they are relegated to issuing subpoenas to compel production of documents and/or of witnesses at trial. Even absent "normal" discovery rights, Interveners are well aware that Kent Walker played a critical role in determining and publicly announcing that the Discriminatees purportedly violated company policy. The Interveners are entitled to question Walker about the basis of these false claims and respectfully request that the Judge DENY its pending Petition to Revoke the Subpoena of Kent Walker.

Respectfully submitted,

Dated: August 22, 2021

Laurie M. Burgess
lburgess@burgess-laborlaw.com
Burgess Law Offices
498 Utah St.
San Francisco, CA 94110
(312) 320-1718

Exhibit A

Gmail **l burgess <lburgess@burgess-laborlaw.com>**

(no subject)

1 message

l burgess <lburgess@burgess-laborlaw.com> Sat, Aug 21, 2021 at 8:19 AM
To: l burgess <lburgess@burgess-laborlaw.com>

From: **l burgess** <lburgess@burgess-laborlaw.com>
Date: Sun, Aug 8, 2021 at 2:09 PM
Subject: Re: Subpoena ad testificandum
To: Kalis, Sara <sarakalis@paulhastings.com>
Cc: Fox, Cameron W. <cameronfox@paulhastings.com>, Latham, J. Al <allatham@paulhastings.com>

Sara - it's difficult to give an estimate at this time. I'll have a much better sense of timing, etc. once we receive your discovery responses.

Thanks,
Laurie

Sent from my iPhone

On Aug 8, 2021, at 5:32 AM, Kalis, Sara <sarakalis@paulhastings.com> wrote:

Laurie,
Thank you for clarifying. For timing purposes, how long do you anticipate your case will take?
Thanks,
Sara

Sara Kalis
Paul Hastings
sarakalis@paulhastings.com
952-240-4558

On Aug 7, 2021, at 5:44 PM, l burgess <lburgess@burgess-laborlaw.com> wrote:

Thanks, Sara. It's my intent to call Google witnesses during my case in chief.

Sent from my iPhone

On Aug 7, 2021, at 1:00 PM, Kalis, Sara <sarakalis@paulhastings.com> wrote:

Laurie,

Thank you for your email. Google will accept service of these subpoenas, of course without waiving its right to seek a Petition to Revoke.

When you say you want to cooperate regarding the timing of their discovery, can you please clarify? I

believe you know that the Region is not calling any of the individuals they subpoenaed in their case-in-chief, but are instead allowing them to be called by Google first. Is that not your intent?

Thanks,
Sara

<http://www.paulhastings.com/>
<image001.png><http://www.paulhastings.com/>

Sara B. Kalis | Of Counsel
Paul Hastings LLP | 200 Park Avenue, New York, NY 10166 | Direct: +1.212.318.6021 |
Cell: +1.952.240.4558 | Fax: +1.212.319.4090 | sarakalis@paulhastings.com<
mailto:sarakalis@paulhastings.com> | www.paulhastings.com<http://www.paulhastings.com/>

From: l burgess <lburgess@burgess-laborlaw.com>
Sent: Friday, August 6, 2021 6:23 PM
To: Kalis, Sara <sarakalis@paulhastings.com>
Subject: [EXT] Subpoena ad testificandum

Sara - greetings. When we previously spoke about issuing subpoena ad testificandum you mentioned that you would be willing to accept service for some of the individuals I listed. I believe that the Region may have already issued subpoenas to some of these folks but I do have my own set of subpoenas to issue. At this time I plan to subpoena Kent Walker, Brad Fuller, Stephen King, Heather Adkins and Thomas Kurian.

I am glad to try to cooperate with you about timing of their testimony. I will be able to provide you with a better sense of that once we receive discovery responses. It's possible that after receiving those responses I decide not to call some of these individuals at all.

Please let me have your thoughts about this at your earliest convenience.

Thanks,
Laurie

p.s. you might alert your secretary/assistant that there is a new heading for the cases and that Amr can be dropped from the service list. Not a big deal but going forward it might eliminate confusion.

Laurie M. Burgess, Attorney
(312) 320-1718 (cell)

this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.
If you reply to this message, Paul Hastings may collect personal information including your name, business name
and other contact details, and IP address. For more information about Paul Hastings' information collection, privacy
and security principles please click HERE<https://www.paulhastings.com/global-privacy-statement>. If you have any questions, please contact Privacy@paulhastings.com<mailto:privacy@paulhastings.com>.
Laurie M. Burgess, Attorney
(312) 320-1718 (cell)

NOTICE OF FILING AND CERTIFICATE OF SERVICE

Please take notice that this 22nd day of August, 2021, the undersigned e-filed the attached **Interveners' Response to Google's Petition to Revoke Subpoena *Ad Testifcandum* No. A-1-1D81Z7L (Kent Walker)** with Region 20, and Division of Judges, Honorable Administrative Law Judge Eleanor Laws, a copy of which is hereby served upon you.

Charged Party / Respondent
Legal Representative
Latham, Al
Paul Hasting LLP
allatham@paulhastings.com

515 South Flower Street
25th Floor
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90071-2228

Charged Party / Respondent
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Paul Hastings, LLP
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ericdistelburger@paulhastings.com

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Charged Party/Respondent
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sarakalis@paulhastings.com

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Charging Party
Legal Representative, CWA
Patricia M. Shea
pats@cwa-union.org

The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Keith Ludlum on February 3, 1994.

(e) Lawanna Johnson

Lawanna Johnson worked for the Respondent from November 1992 to November 1993 in the conversion department on the cut floor. She was on the employees' union organizing committee and her name was included in the letter which was sent to the Respondent noting that fact. Lawanna Johnson testified that the letter (CP Exh. 3), was posted in the plant in several locations; that her supervisor, Marty Hast, told her in the presence of other employees that he had seen her name on the letter for organizing for the Union and the Company did not want the Union in the plant; that in early 1993 she attended a meeting conducted by Henry Morris who she believed was the plant superintendent at the time; that when Morris said that the Company had an open door policy and would be willing to work with the employees on any problem she stood up and spoke out saying that "this is a bunch of bologna, a bunch of lies. They're [sic] not an open door policy. They're [sic] not going to do anything for us";[77] that she did not recall anyone else standing up and speaking out at this meeting; that shortly after the meeting Hast told her she had to do the floor twice by herself when normally there would be two men on that job; that her normal job at the time was skinning and packing ribs and she had never been assigned this cleaning job before; that in the spring of 1993 she applied for different jobs seeking higher pay but she did not get any of the jobs; that Harold Allen, who was a supervisor in the department next to hers, told her during a break that she could not get another position because everyone knew that she was for the Union;[78] that in July 1993 she did get a blade job (cutting the meat from the bones) unofficially when she switched with another lady who was having a problem with her hands, but she did not get the higher pay for the job; that when she asked about the pay Hast told her she was not qualified for the position; that Hast did tell her that he thought she was doing a good job; that she got a job on the cut floor working under Dale Smith; that she experienced problems with her hands on the blade job; that she saw the company doctor who told her that it seemed like she had carpel tunnel syndrome; that she took time off from work because her hands were swollen and ached and she had to take medication; that she also missed time from work when her husband was sick with deterioration of the lung tissue and had to be taken to the hospital; that on September 9, 1993, she attended a union cookout and she saw some of the ere but she could not recall their , 1993, Cut Floor Superintenden he had heard that she was making racial s around September 21 doctor's note to her cated that she was from "9–21–93" thro told her that she shou completely released h 1993, and he gave he able to return to emp she brought this secc was the head of hum returned to work or chance agreement (G husband had a breath dent to let them kno hospital and she wou Respondent's policy the shift they called i husband to the hospit was the one in Fay County Hospital; th returned home and sl band, asking him to know that they were point in going to wor the following day, No speaking with Larry last-chance agreemer spoken with her hus why she had not sp walked in her termin husband had been ill spondent ever told he she never saw anythir

On cross-examina had never seen a wor cleaning the floor by sion; that she could r attended the union co the plant they worke Company and told th tober 11, 1993; that s Company; that she w letter of termination; sences were due to t spondent's plant, nar name of her husband gan having major pro she took her husband and they returned hor

[77] Henry Morris testified that he did remember an employee standing

Exhibit B

To: Kyle Dhillon
Date: January 6, 2020
From: Ben Johns
CC: Jeff Gilbert, Hartwig Adam
Kibra Yemane, People Consultant
Kimia Busse, People Partner
Re: Final Written Warning

Contains Confidential Information

Kyle,

As you are aware, Global Investigations and Ethics & Compliance recently investigated concerns regarding the unauthorized emergency rapid release of a modification to the Security and Privacy Policy Notifier Chrome Browser Extension. The modification was created by a Software Engineer and was approved via a "*LGTM*" (Looks Good To Me) by you. It was determined that you knowingly and intentionally gave your *LGTM* approval for the pop-up using the Security and Privacy Policy Notifier for messaging that was neither a security nor a privacy reminder, without business justification. Your actions were found to be in violation of Google's policy, including the Basic Security Policy and the Change Management Security Policy. The details of that investigation were discussed with you on December 13, 2019 and were based on a recommendation by the the Access Review Committee that was approved by your Senior Director, Blaise Aguera y Arcas.

Your behavior in this situation was found to be inappropriate, and in violation of the Basic Security Policy, the Change Management Security Policy. You have been advised to review the above linked policies and re-read the Standards of Conduct Policy. Please ensure that you are clear on what is required to comply with them going forward. In addition to the above, your leadership wants to ensure that you are following Google's established rules regarding the kinds of approvals that require business justification. As part of your return from administrative leave, there will be a suspension of your change list approval privileges. The details of that suspension will be communicated to you in due course.

In addition, there was a review of your conduct concerning the creation of the "always-ask-Kent" extension. The Ethics & Compliance team concluded that, based on the

clear on what is required to comply with them going forward. In addition to the above, your leadership wants to ensure that you are following Google's established rules regarding the kinds of approvals that require business justification. As part of your return from administrative leave, there will be a suspension of your change list approval privileges. The details of that suspension will be communicated to you in due course.

In addition, there was a review of your conduct concerning the creation of the "always-ask-Kent" extension. The Ethics & Compliance team concluded that, based on the facts found, there had not been a policy violation with respect to that extension. The team explained to you, however, that the use of that extension had the potential of violating the Standards of Conduct Policy by unreasonably interfering with executive team members' productivity or other legitimate goals. But that had not occurred in this instance.

This final written warning is to remind you that as a Google employee, you are expected at all times to act in a way that is consistent with our security policies. Copies of the relevant portions of the policies cited above are attached, to which you have access. Please read these and ensure that you are clear on what is required to comply with them going forward.

In addition, you understand that if you violate Google policy or otherwise engage in inappropriate conduct in the future, you could be subject to additional disciplinary action up to and including termination of employment.

If you have any questions concerning this document, please contact People Consultant, Kibra Yemane who can speak with you whenever the need arises.

ACKNOWLEDGMENT:
I acknowledge that I have read the above memo and have received a copy.

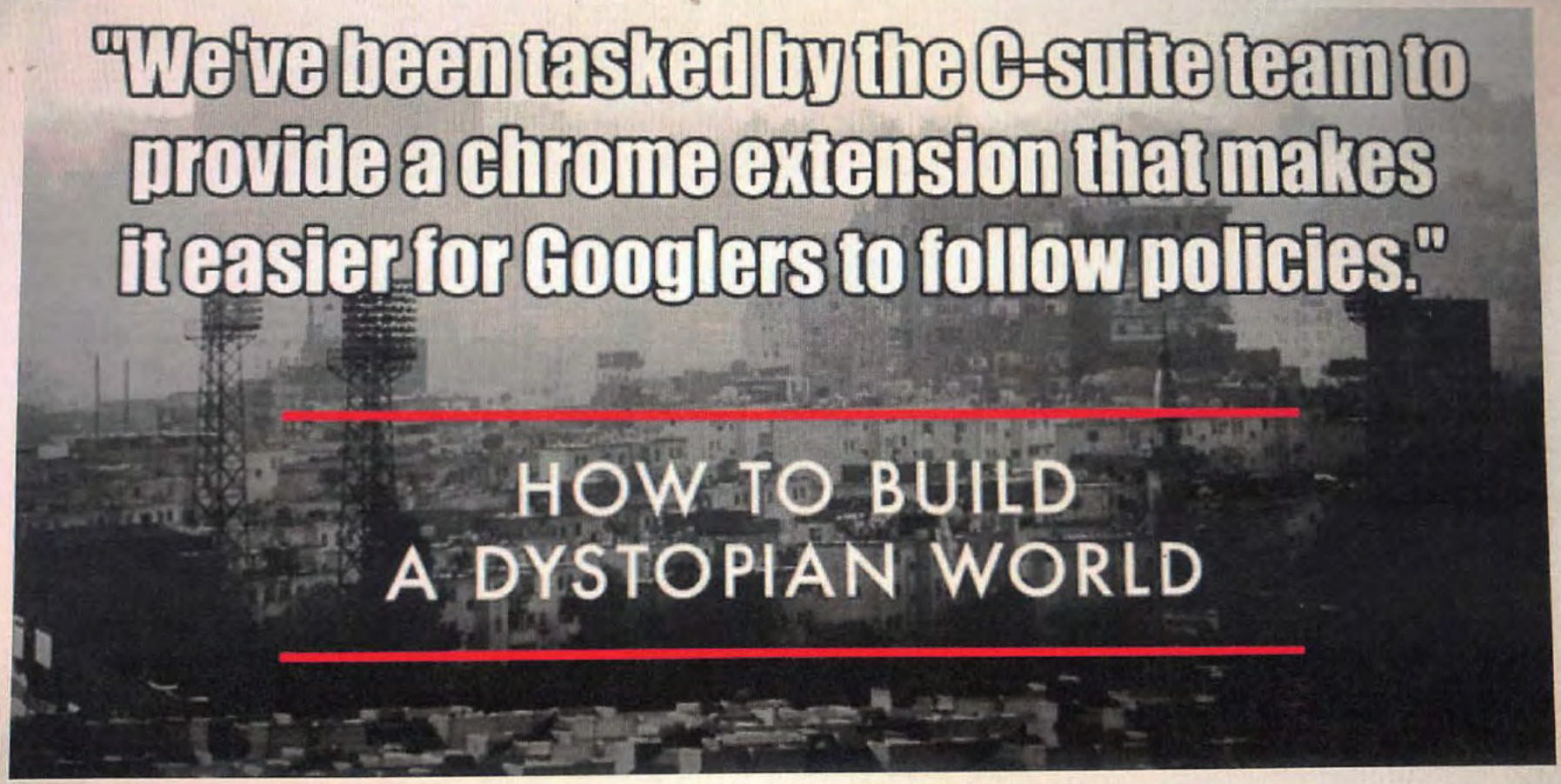
_____ _____

Kyle Dhillon Date

Exhibit C

[redacted]

Oct 22, 2019, 7:28 AM



+979

Template	how_to_build_a_dystopian_world
Context	https://docs.google.com/document/d/1Xr-dCb29WfHCugjHOZiNPEW835fhNDkT8Fc96mtRqiw/preview

[redacted]

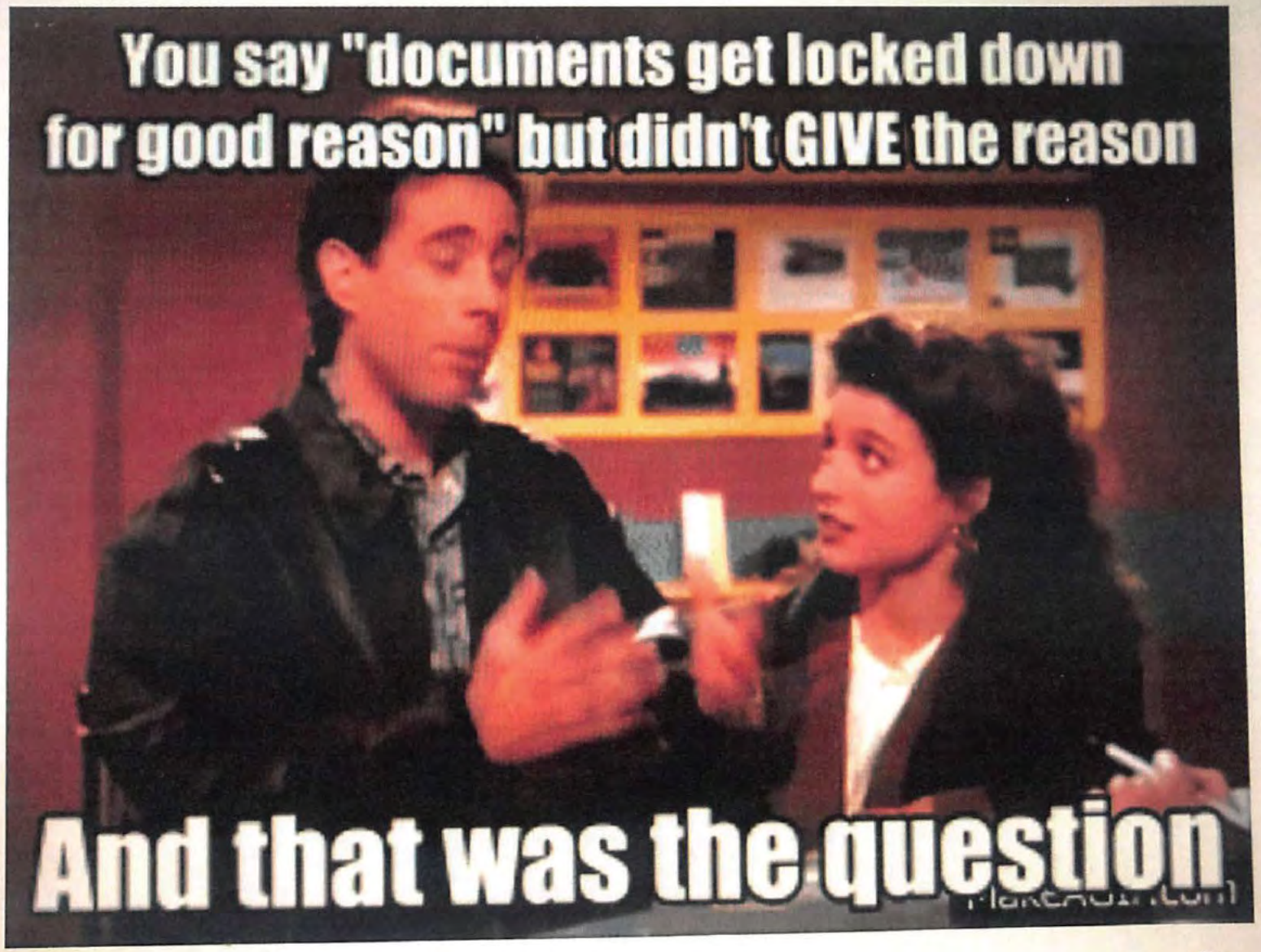
Oct 24, 2019, 4:40 PM

+187

Template dontknow

Comments (2) Metrics

Oct 24, 2019, 4:43 PM



+904

Template seinfeld_car_reservation_better_animated

[redacted]

Nov 2, 2019, 1:48 PM

+156

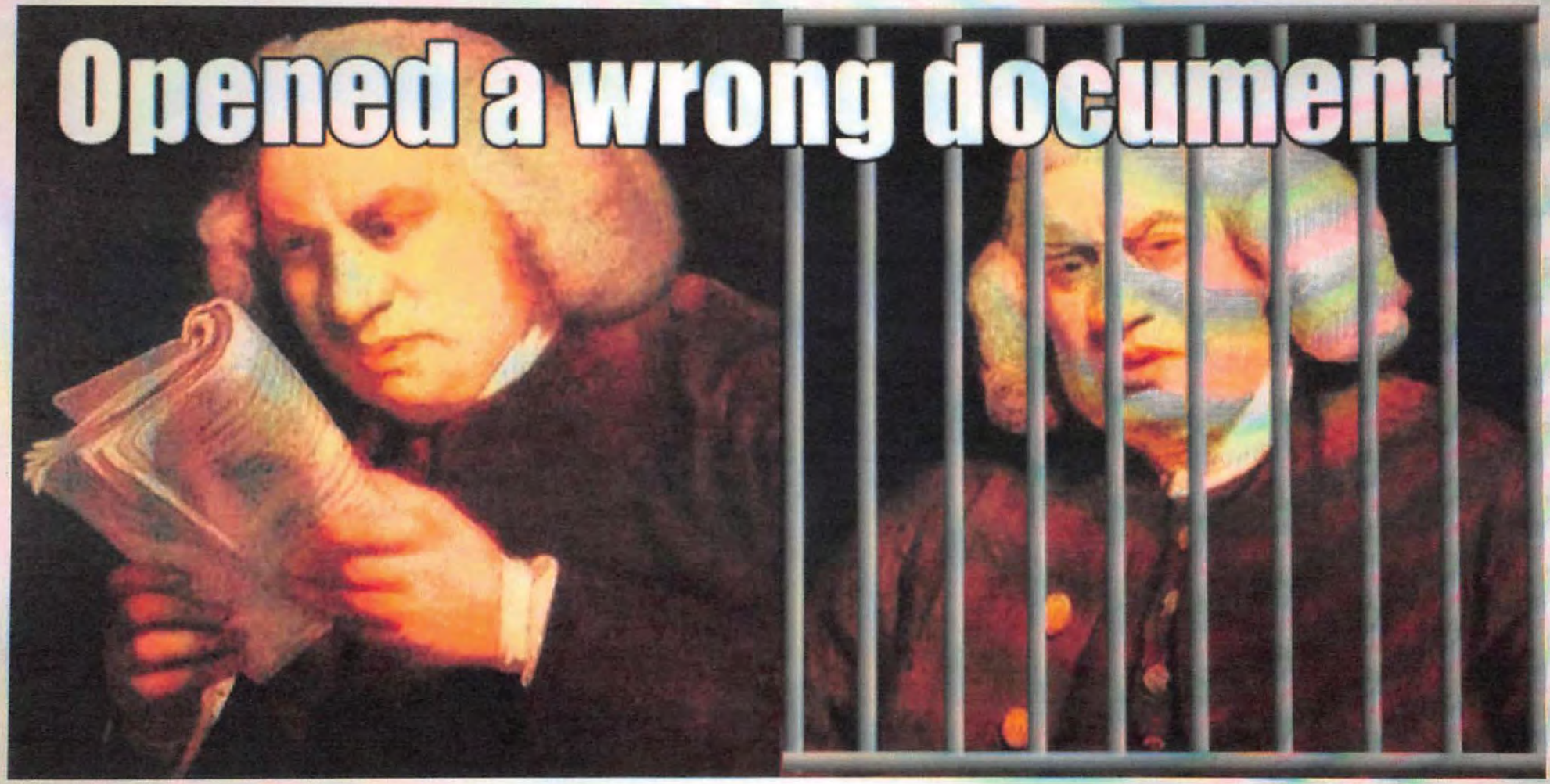
Template hawtch_hawtchers

Context go/community-guidelines-in-action

Nov 15, 2019, 5:45 PM

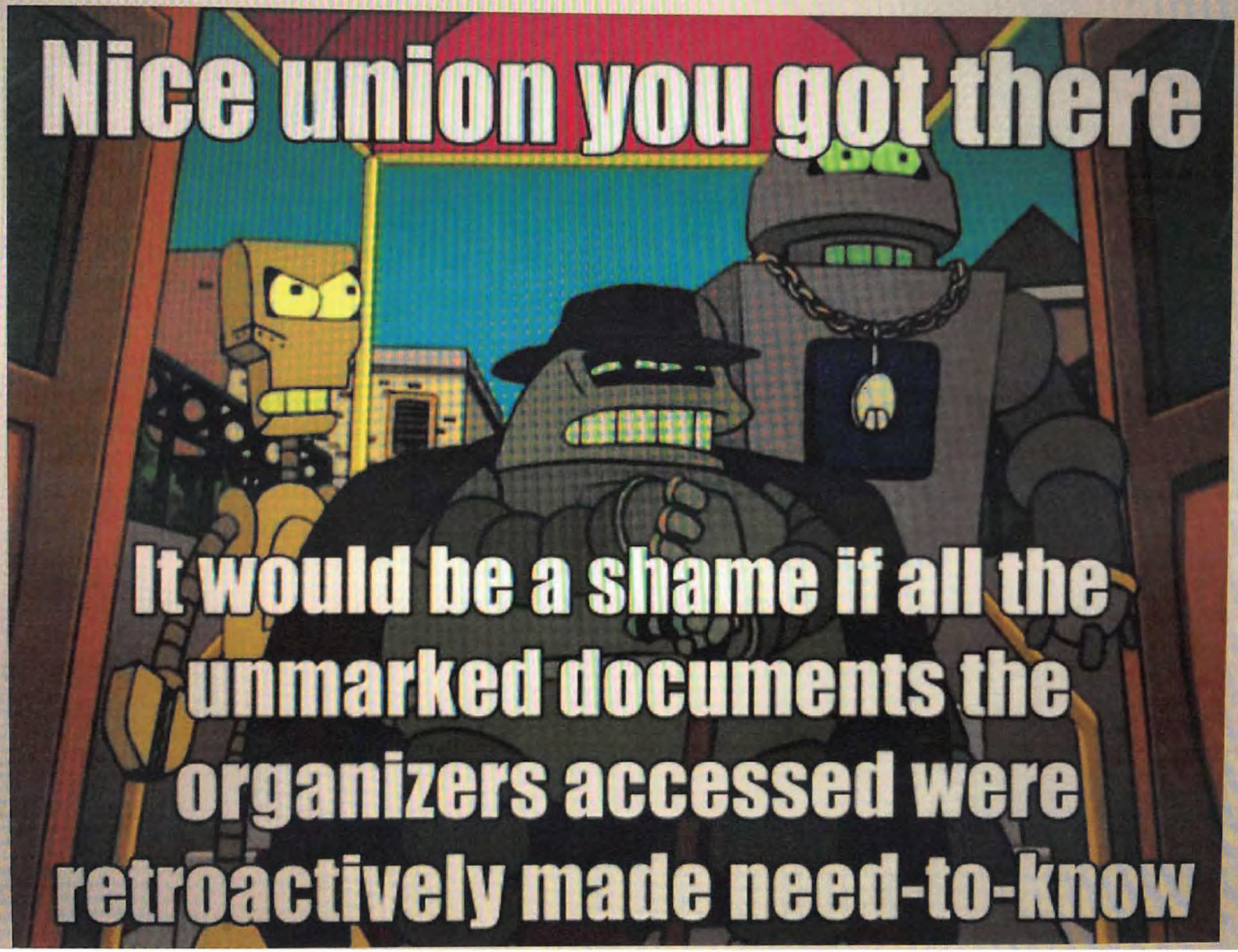
+999

Nov 13, 2019, 9:49 AM



+1093

Nov 25, 2019, 3:16 PM



Nov 25, 2019, 2:34 PM

Some recent communications from execs are being designed to deliberately blur lines.

And scare people into thinking twice about questioning anything.

Fear of retaliation among Googlers will mean Maven 2 or other controversial projects can go ahead easier

 +454   

Nov 25, 2019, 5:46 PM

+126

Template laughing_bosses

Context https://groups.google.com/a/google.com/forum/#!topic/google/h718P1gvWTs

Exhibit D

By Kent Walker

I understand a few people are talking about our Need to Know policy and our Community Guidelines. Sharing information is obviously important to Googlers and Google. Our guidelines in this area are designed to provide clarity on how we can get, share, and secure the information we need to do our work. These are of course fine things to discuss, but there are some inaccurate theories circulating, so while we generally don't provide details of personnel decisions, I wanted to provide some background facts.

First, no one was put on administrative leave for merely accessing or opening a single need-to-know doc. We do carefully and thoroughly investigate and take action against violations of our policies, particularly when they result in wide sharing of confidential material, external leaks of internal-only material, or behavior that makes our employees feel unsafe. To be specific:

1. An individual was recently terminated for leaking Googlers' names and personal details to the media. This sort of thing is simply not ok. We've seen leaks of emails, internal discussion threads, live TGIF discussions, MOMA screenshots, calendar invites, and more, as a way of criticizing fellow employees or developments at Google. For example, not only did the content of a recent TGIF leak, but we got an email from a reporter following a recent Social TGIF (i.e., where people get together to socialize and snack) asking why our internal calendar invite didn't include "the usual link" to enable people to remotely access it (the reporter wrote "this does appear to be the case based on screenshots I saw of the prior calendar invite and the most recent one").
2. A second person has been put on leave while the investigations team looks into why they deliberately searched for, accessed, and shared a number of confidential or need-to-know documents outside the scope of their job, after receiving prior feedback not to do so. Many of these documents subsequently appeared in the press.
3. A third person has been put on leave while we investigate a series of actions they took, including tracking a wide range of individual calendars of folks on the Community Platforms, POps, and Comms teams, causing a lot of stress for people who are just trying to go about their work.

I've seen some comments saying that our approach to these things has changed, but I've been here a long time, and I can tell you that Google never tolerated this type of behavior. If we live up to our goals as a company, we have the potential to develop incredible products and services that can help billions of people around the world. While it's great to have constructive disagreements, we can't let internal wrangling get in the way of that mission. We need an environment that lets us work well with each other on our shared goals.

Community Guidelines Policy [11/12/2019]

By Kent Walker

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1. An individual was recently terminated for leaking Googlers' names and personal details to the media. This sort of thing is simply not ok. We've seen leaks of emails, group discussion threads, live TGIF discussions, MOMA screenshots, calendar invites, and more, as a way of criticizing fellow employees or developments at Google. For example, not only did the content of a recent TGIF leak, but we got an email from a reporter following a recent Social TGIF (i.e., where people get together to socialize and snack) asking why our internal calendar invite didn't include "the usual link" to enable people to remotely access it (the reporter wrote "this does appear to be the case based on screenshots I saw of the prior calendar invite and the most recent one").
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Exhibit E

All right. Let's get the presenters up. Come on up. And let's switch to dory.

All right.

Many Googlers are concerned with the updates to the data clarification policies. Especially when it comes to their impact on Google's open culture. Could you please clarify and reword those policies?

Kent is here.

>>Kent Walker: Hey, guys. Are we live? There we go.

So it was my announcement that came up, so I wanted to come and chat with people about this. Thank you for the question and the chance to clarify. There have been some misunderstandings about what the policy does and doesn't say.

So first off, it's important to note that we've always had formal policies on sensitive data

formally since 2007 and always had policies around data security. It's never been okay to use or share this kind of data, user data, customer data, without authorization, whether it was labeled or not. And we actually have fired people who have inappropriately accessed sensitive data, user data, privacy information, et cetera, where there wasn't a business justification for doing that.

The rule here is pretty simple: Don't use data that was meant for a specific purpose for anything other than that purpose.

At a company our size, we need to have rules of the road to make sure we're all on the same page about this sort of stuff. We have a lot of new people coming in -- welcome, Nooglers -- and many others who may not be aware of the policy. So we wanted to make sure that it was broadly understood. We obviously have had some leaks of both confidential information and need-to-know information, and we're now working both directly and indirectly on a lot of new areas, whether that's health care or financial services, et cetera, where we and our partners have responsibilities legally and contractually and to end users, to patients, to keep information confidential.

So when we write our policies to deal with this huge number of different things that Google is involved in, we try to write them in a short and a simple and a non-bureaucratic way, treating all -- all of us as smart, reasonable people. We don't want to be one of those companies with a 300-page manual where you have, you know, one form for stapler requisitions -- and I can't remember the office space example, the form 87J, and here's their records retention requirement and here's exactly how it's characterized. We want to have 1-, 2-, 3-page policies, with some illustrative examples, and let you use your common sense to make the right decision.

So given our evolving business, it probably wouldn't work anyway to have incredibly granular descriptions of everything we do. So when we update these policies, we're typically adding examples and doing things that are exactly meant to clarify the purpose. We want to keep the wording simple and clear.

I've actually gone back and looked at the examples in this policy, and I think they are representative of the kinds of documents that we have in mind.

We never required everybody in the company to label every document you create. That wouldn't be feasible or manageable. And, again, many kinds of information are obviously need-to-know or confidential.

It helps to have a label. It helps to avoid accidental access and the like. But, again, we look to you guys to use your common sense, to evaluate the nature of the information, just like we always have.

So we interpret these policies reasonably. We're not gonna fire somebody for accidentally stumbling across a need-to-know document. Come on. That would be silly. We spend a lot of time and effort to find and bring in some incredibly talented people.

On the other hand, if somebody trolls through a bunch of other people's documents, seeking what's obviously need-to-know information, and there's not a justified business purpose for it, that's pretty obviously a different deal.

So bottom line: If you come across something that you reasonably think is need-to-know material, but you're not sure, check with the author of the team. We have had questions already of the security and privacy team, that alias SP@, to ask questions about? What about this

category of document or that category of document? That's great. That's a really good way to answer any follow-up questions you might have.

So thanks for your work on this.

[Applause]

>>Sundar Pichai: All right. You may want to stay. I think there's one more question.

We're having less TGIFs. Reading other teams' slides and design docs can lead to disciplinary action.

I think Kent clarified that part.

More than ever we get to know of our new products from the press earlier than form our peers. How can we ensure we don't instate a fear of information that hurts innovation?

>>Kent Walker: Yeah. So we share this goal, right? We want to have an open and transparent and collaborative kind of environment as we work on these issues. And at the same time, it's important that we have a clear understanding about how information can be shared and, you know, what information is appropriate to share freely. That's why we need those rules of the road I talked about a moment ago, precisely because leaks of information can erode the kind of trust that allows us to collaborate.

So in a sense, I mean, this is -- I come to pretty much every TGIF. And we, Sundar, other leaders, take some hard questions. And we try our best to give you straight answers to those questions, because that's how we think we should operate. You may not always agree with every answer you get, but that's okay too. We may make mistakes. None of us is perfect. But when you leak about our business, that's corrosive. That undermines the spirit of trust that lets us work together so well.

So ask us the tough questions, but please don't leak. Thanks.

[Applause]

>>Sundar Pichai: Thank you.

The only thing I would add is, I think a lot of what is originating all this is we generally deal with very confidential user data. Historically, we've always understood how sacred consumer data is but, you know, when we talk about respecting our users, increasingly our users are other companies, other institutions, and we make representations, legally, contractually, about how their data can be shared within Google, right? And so I think it's incredibly important to get this right so that we can actually honor the contracts we sign with customers as well.

But appreciate the question. I think it was a good discussion, and I'm sure we'll continue clarifying it.

NOTICE OF FILING AND CERTIFICATE OF SERVICE

Please take notice that this 22nd day of August, 2021, the undersigned e-filed the attached **Interveners' Response to Google's Petition to Revoke Subpoena *Ad Testifcandum* No. A-1-1D81Z7L (Kent Walker)** with Region 20, and Division of Judges, Honorable Administrative Law Judge Eleanor Laws, a copy of which is hereby served upon you.

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National Labor Relations Board

CERTIFICATE OF SERVICE

I, Laurie M. Burgess, Burgess Law Offices P.C., certify that this 22nd day of August, 2021, served a copy of the foregoing **Interveners' Response to Google's Motion to Revoke Subpoena *Ad Testificandum* No A-1-D81Z7L (Kent Walker)** on the above parties of record, by and through their counsel, by sending a copy of same via email (lburgess@burgess-laborlaw.com) to their individual email addresses above.

Dated: August 22, 2021

/Laurie M. Burgess/

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(312) 320-1718

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

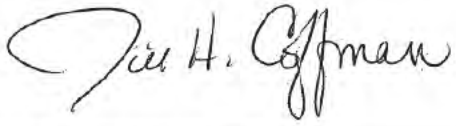
GOOGLE, LLC and ALPHABET INC., a single employer	
and	
EDWARD GRYSTAR, an Individual	**Cases 20-CA-252802**
and	
KYLE DHILLON, an Individual	**20-CA-252902**
and	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	**20-CA-252957** **20-CA-253105** **20-CA-253464**
and	
KATHRYN SPIERS, Intervenor	(20-CA-253105; 20-CA-253464)
and	
SOPHIE WALDMAN, Intervenor	(20-CA-252957)
and	
PAUL DUKE, Intervenor	(20-CA-252957)
and	
REBECCA RIVERS, Intervenor	(20-CA-252957)

ORDER REFERRING PETITION TO REVOKE
SUBPOENA DUCES TECUM TO ADMINISTRATIVE LAW JUDGE

A Petition to Revoke Subpoena Duces Tecum A-1-1D81Z7L having been filed with the Regional Director on August 18, 2021 by counsel for Respondent,

IT IS ORDERED, pursuant to Section 102.31(b) of the Board's Rules and Regulations, that the Petition is hereby referred to the Administrative Law Judge for ruling.

Dated: August 18, 2021



JILL H. COFFMAN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

GOOGLE, LLC AND ALPHABET INC., A SINGLE EMPLOYER

and **Case 20-CA-252802**

EDWARD GRYSTAR, an Individual

AFFIDAVIT OF SERVICE OF: Order Referring Petition to Revoke Subpoena Duces Tecum to Administrative Law Judge, dated August 18, 2021.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 18, 2021, I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

Sara Kalis , ESQ.
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Laurie M. Burgess , Counsel
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San Francisco, CA 94110-1435

August 18, 2021	Donna Gentry, Designated Agent of NLRB
Date	Name
	/s/ Donna Gentry
	Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party, vs. GOOGLE LLC and ALPHABET INC., a single employer, Respondents.	**CASE NO. 20-CA-252957, 20-CA-253105, 20-CA-253464** **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L**

I. INTRODUCTION

Counsel for the alleged discriminatees has served subpoenas *ad testificandum* for five witnesses at the upcoming hearing. Four of the five subpoenas present no issue. But the fifth subpoena[1] – which seeks live hearing testimony by Google's Chief **Legal** Officer, Kent Walker – is improper and should be revoked for two reasons.

First, Mr. Walker was not a participant in (or even a witness to) any of the disciplinary decisions at issue. He has no connection to this case, aside from his name coming up in the context of a 2019 prank led by alleged discriminatee Kyle Dhillon. Specifically, Dhillon and others helped create a way for Google employees to have their computers send an automatically-generated email alert to Mr. Walker's company email address every time that each employee opened any internal Google document. Dhillon was not disciplined (nor was anyone else) – the prank did not violate Google policy. Mr. Walker was not involved in the investigation, or any decisions regarding Google's response to the prank. *See* Declaration of Kent Walker, attached as Exhibit A. Against this background, there is no basis for subpoenaing him to testify.

[1] Subpoena *Ad Testificandum* No. A-1-1D81Z7L was issued and served on August 10, 2021. A copy is attached as Exhibit B.

Second, Mr. Walker's role is that of legal counsel (he is the most senior attorney in the company). To the extent he has knowledge about this case more generally, his thoughts, analyses, and mental impressions are attorney work product, and his internal communications about this case are privileged. In light of that, he is not the kind of witness who can, or should, be forced to appear for an examination that is likely to become a fishing expedition.

For both of these reasons, the subpoena should be revoked.

II. ARGUMENT

A. Mr. Walker Had No Involvement in the Disciplinary Decisions at Issue In This Case; There Is No Basis For Subpoenaing Him To Testify

This case is about Google's disciplinary decisions in response to the behavior of six former and current employees: Paul Duke, Rebecca Rivers, Sophie Waldman, Kathryn Spiers, Kyle Dhillon and Eddie Grystar. Mr. Walker had no involvement in any of those decisions. That was established long ago by the thousands of pages produced by Google during this case, which show the names of those who were involved. (Mr. Walker is not named even once.) Mr. Walker's lack of involvement is now further established by his Declaration. (Exhibit A.) On this record, there is no basis for his testimony to be subpoenaed.[2]

Notably, Counsel for the General Counsel realized quickly that Mr. Walker was not needed as a trial witness, and chose not to subpoena him – opting instead for a simple stipulation as to Mr. Walker's receipt of the prank emails described above. Counsel for alleged discriminatees knows of that stipulation, and Google has offered to consider additional factual stipulations that can obviate the need for Mr. Walker to appear. As of the date of this filing, counsel for the alleged discriminatees has not identified any fact that supposedly needs to be established through Mr. Walker, and yet also refuses to withdraw the subpoena.

[2] Under 29 C.F.R. § 102.31(b), a subpoena should be revoked if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings …."

B. To The Extent Mr. Walker Knows Anything About This Matter, It Is In His Role As Legal Counsel; His Knowledge And Internal Communications About This Matter Are Absolutely Privileged

Given Mr. Walker's lack of involvement in any of the underlying events, his only knowledge of this case comes from his role as the company's legal counsel – specifically, through his privileged communications with other Google attorneys and members of Google management, and as a function of his own analyses and mental processes, which are attorney work product. Mr. Walker cannot be required to divulge either one at this hearing.

As a threshold matter, it is well-established that the attorney-client privilege applies to "in-house" counsel just as it would to any other attorney. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1974). The Board recognizes the attorney-client privilege as "fundamental," noting that "[w]ithout the protection afforded by this privilege, the open communication necessary for accurate and effective legal advice would be virtually impossible." *Smithfield Packing Co*., 344 NLRB 1, 13 (2004), *enf.* 447 F.3d 821 (DC Cir. 2006). The purpose of the attorney-client privilege is to ensure and encourage complete disclosure of information and communication between counsel and clients, promoting the ultimate observance of the law and administration of justice, and protecting the ultimate broader public interest at stake. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.")

Federal law is clear that "[a] subpoena may not be used by a party to obtain privileged information." 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2458 (3d ed. 2008). As a result, privilege is one of the established bases for seeking revocation of a subpoena. *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 497 (4th Cir. 2011) (the reasons for subpoena revocation "include not only those that are immediately apparent on a subpoena's face but also those that can be determined through reference to authority, for instance the evidentiary rules of ***privilege***") (emphasis added). *See also*, 29 C.F.R.

§ 102.31(b) (a subpoena should be revoked "if for any other reason sufficient in law the subpoena is otherwise invalid").

Mr. Walker was Google's Chief Legal Officer for all of the time periods at issue in this case, and still occupies that role today. As such, efforts to force him to testify are subject to the so-called "Shelton test," which was first set out in *Shelton v. Am. Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986). Under *Shelton*, legal counsel should only be called to testify under limited circumstances in which "the party seeking to [call the attorney as a witness] has shown that (1) no other means exist to obtain the information than to [subpoena] opposing counsel; (2) the information sought is relevant and nonprivileged; ***and*** (3) the information is crucial to the preparation of the case." *Id*. (citations omitted) (emphasis added); *see also M.A. Mobile Ltd. v. Indian Inst. of Tech. Kharagpur*, 2014 U.S. Dist. LEXIS 26376, at *6 n.1 (N.D. Cal. Feb. 28, 2014) ("the *Shelton* test is widely accepted in this district"); *Natural Alternatives Int'l, Inc. v. Creative Compounds, Inc.*, 2016 U.S. Dist. LEXIS 175231 (S.D. Cal. Dec. 16, 2016) ("our district has routinely applied the [*Shelton*] test to situations where, as here, a party seeks to take the deposition of opposing counsel"); *Stevens v. Corelogic, Inc.*, 2015 U.S. Dist. LEXIS 165874 (S.D. Cal. Dec. 10, 2015) ("courts in this district and elsewhere in the Ninth Circuit recognize *Shelton* … and follow the three-factor test laid out in the case.").

None of the three circumstances required under *Shelton* is present here, let alone all of them. Moreover, the fact that counsel for the alleged discriminatees insists on Mr. Walker's live testimony despite Google's offer to enter into an appropriate factual stipulation (as Google already has done with counsel for the General Counsel) speaks volumes about the intent behind this particular subpoena. *See Shelton*, 805 F.2d at 1330, fn. 7 (several factors supported the argument that plaintiffs' counsel was attempting to discover opposing counsel's mental impressions on the case, including their rejection of the company's offer to establish facts through other methods that would not run the risk of invading privilege).

III. CONCLUSION

As shown above, the subpoena *ad testificandum* issued to Mr. Walker has no legitimate purpose – it does nothing more than create opportunities to try to invade Google's attorney-client privileged communications and attorney work product. Google requests that the subpoena be revoked in its entirety pursuant to 29 C.F.R. § 102.31(b).

DATED: August 17, 2021

Respectfully submitted,
PAUL HASTINGS LLP
CAMERON W. FOX
J. AL LATHAM, JR.
SARA B. KALIS
ERIC DISTELBURGER

By: _____

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Attorneys for Respondents
GOOGLE LLC and ALPHABET INC.

EXHIBIT A

DECLARATION OF KENT WALKER

I, Kent Walker, do hereby declare and state as follows:

1. I have personal, first-hand knowledge of the facts set forth in this declaration and, if called upon to do so, I could and would testify competently to them.

2. I make this Declaration in support of Respondents Google LLC and Alphabet Inc.'s petition to revoke Subpoena *Ad Testificandum* No. A-1-1D81Z7L.

3. I am the Chief Legal Officer and Senior Vice President of Global Affairs for Google. I have held those titles since 2018, before which I served as General Counsel.

4. I was not involved in the investigations of, or the disciplinary decisions related to, Sophie Waldman, Paul Duke, Rebecca Rivers, Laurence Berland, Kathryn Spiers, Eddie Grystar, or Kyle Dhillon. All knowledge that I have regarding those individuals, and regarding this case, comes from privileged communications and my own analysis, as part of my role as the company's legal counsel.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of August 2021 at Palo Alto, California.

Kent Walker

Kent Walker

EXHIBIT B

Subpoena Ad Testificandum No. A-1-1D81Z7L

Kalis, Sara

From: l burgess <lburgess@burgess-laborlaw.com>
Sent: Tuesday, August 10, 2021 12:52 PM
To: Kalis, Sara
Subject: [EXT] Subpoenas
Attachments: Google witness Subpoena.pdf

Sara - per our discussion over the weekend, attached please find subpoenas for Kent Walker, Brad Fuller, Stephen King, Heather Adkins and Thomas Kurian.

Many thanks,
Laurie

Laurie M. Burgess, Attorney
(312) 320-1718 (cell)

FORM NLRB-32

SUBPOENA

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Kent Walker 201 Spear Street, San Francisco, CA 94105

As requested by Laurie M. Burgess

whose address is 498 Utah Street, San Francisco CA 94110
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

of the National Labor Relations Board

at Natalie P. Allen Memorial Courtroom, 901 Market Street, Suite 400
San Francisco, California, or method or means, including videoconference, directed by the
in the City of Administrative Law Judge.

on August 23, 2021 at 9:00 AM or any adjourned

or rescheduled date to testify in Google, LLC and Alphabet Inc., a single employer
20-CA-252802, et al.
(Case Name and Number)

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

A-1-1D81Z7L

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at San Francisco, CA

Dated: July 23, 2021

Lauren McFerran

Lauren McFerran, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2021, I electronically filed the foregoing **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L** with the National Labor Relations Board using the agency's website (www.nlrb.gov). I also certify that I have served said **RESPONDENTS GOOGLE LLC AND ALPHABET INC.'S PETITION TO REVOKE SUBPOENA AD TESTIFICANDUM NO. A-1-1D81Z7L** upon the following parties, via e-mail, pursuant to NLRB Regulation 11846.4(b):

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DATED: August 17, 2021

Respectfully submitted,
PAUL HASTINGS LLP
CAMERON W. FOX
J. AL LATHAM, JR.
SARA B. KALIS
ERIC DISTELBURGER

By: _____

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